Abdul Rahman bin Mohd Mera v Transnasional Express Sdn Bhd & Anor

HIGH COURT (KUANTAN) — CIVIL APPEAL NO 12–21 OF 2003
MOHAMED APANDI ALI J
13 FEBRUARY 2007

Damages (Personal Injury or Death) — Personal injuries — Loss of future earnings — Whether the plaintiff had established that the accident had resulted in his loss of future earnings — Plaintiff was drawing a better income after the accident — Assessing damages for 'loss of future earnings' — Civil Law Act 1956 s 28A

The claim arose from an accident which occurred on 10 August 1997. The plaintiff/appellant was a passenger in an express bus that overturned and caused the plaintiff to suffer losses and injuries. The learned sessions court judge who heard the matter had refused to allow the plaintiff's claim for 'the loss of future earnings', and that the award for general damages was said to be very low. The appeal on those issues were dismissed. This was an appeal by the plaintiff against that decision in respect of quantum only ie, 'the loss of future earnings and the award for pain and suffering'. The plaintiff was working with a company known as Denta Ocean Construction until June 1997 before the accident. He then had to quit his job as his employer's contract had expired. He then started working for his mother which was also before the said accident. After he met with an accident on 10 August 1997 he was unable to perform any work for six months. After that he went back to work with Denta Ocean Construction as a driver for a lesser pay compared to what he got from his mother as a cook and waiter but the figure he received was not mentioned at all. When he gave evidence in court on 10 March 2003, he had already started his own business, operating a coffee shop with his wife with a net income of RM3,000 per month.

Held, dismissing appeal with costs:

(1) From the evidence, it was clear that the plaintiff did not suffer any loss but instead he was drawing a better income after the accident. He stopped working for Denta Ocean Construction not because of his inability to work but he had to, because his employer's contract job expired. There was no evidence indicating that the company refused to renew his contract because of his injuries. He chose to work for his mother who offered a 'better pay' as claimed (see para 8).

(2) His evidence showed that he was not having any problem with his income as there was no reduction at all. In fact, his business was doing well with a net income of RM3,000 a month. This showed that despite his injuries he could still work and eke out a better living (see para 9).

(3) For the purpose of assessing damages for 'loss of future earnings', s 28A of the Civil Law Act 1956 applies. The law was clear that the plaintiff's earnings 'at the time when he was injured' was the only relevant amount that should be taken into account in computing any loss of future earnings. The appellant's counsel was harping on the plaintiff's earnings during his employment with Denta Ocean Construction, whereas evidence in court showed that at the material time when the plaintiff was injured, he was not working with the said company. The plaintiff had stopped working with Denta Ocean Construction one month before the date of accident. The plaintiff had not shown that his condition deteriorated after the accident and affected his earning capacity, but on the other hand, his earning capacity improved after the accident (see paras 11–13).

[Bahasa Malaysia summary

Tuntutan ini berbangkit daripada satu kemalangan pada 10 Ogos 1997. Plaintif/Perayu adalah penumpang di sebuah bas ekspres yang terbalik dan menyebabkan plaintif mengalami kehilangan dan kecederaan. Hakim mahkamah sesyen yang bijaksana yang mendengar perkara tersebut enggan membenarkan tuntutan plaintif untuk 'kehilangan mata pencarian', dan memberi award untuk ganti rugi am dan award tersebut dikatakan terlalu rendah. Rayuan terhadap isu-isu tersebut telah ditolak. Ini adalah rayuan plaintif terhadap keputusan berhubungan dengan kuantum sahaja iaitu 'kehilangan mata pencarian dan award untuk kesakitan dan kesengsaraan'. Plaintif telah bekerja dengan sebuah syarikat yang dikenali sebagai Denta Ocean Construction sehingga Jun 1997 sebelum kemalangan tersebut. Beliau kemudiannya terpaksa berhenti pekerjaannya oleh kerana kontrak majikannya telah tamat. Beliau kemudiannya mula bekerja dengan ibunya juga sebelum kemalangan tersebut. Selepas beliau menemui dengan satu kemalangan pada 10 Ogos 1997 beliau tidak dapat bekerja untuk enam bulan. Selepas itu, beliau telah kembali bekerja dengan Denta Ocean Construction sebagai seorang pemandu untuk bayaran yang lebih rendah berbanding dengan apa yang beliau dapat daripada ibunya sebagai seorang tukang masak dan pelayan tetapi jumlah yang diterimanya tidak dinyatakan. Apabila beliau memberi keterangan di mahkamah pada 10 Mac 2003, beliau telah memulakan perniagaannya sendiri, mengendalikan sebuah kedai kopi bersama isterinya dengan pendapatan bersih sebanyak RM3,000 sebulan.

Diputuskan, menolak rayuan dengan kos:

(1) Daripada keterangan, ia adalah jelas bahawa plaintif tidak mengalami sebarang kehilangan tetapi sebenarnya mendapatkan pendapatan yang lebih lumayan selepas kemalangan tersebut. Beliau berhenti kerja dengan Denta Ocean Construction bukan kerana ketidakupayaannya untuk bekerja tetapi terpaksa, oleh kerana kontrak majikannya telah tamat. Tiada bukti yang menunjukkan syarikat tersebut enggan memperbaharui kontraknya oleh kerana kecederaannya. Beliau pilih untuk bekerja dengan ibunya yang memberinya tawaran 'gaji yang lebih baik' seperti yang dinyatakannya (lihat perenggan 8).

(2) Keterangannya menunjukkan bahawa beliau tidak mengalami sebarang masalah dengan pendapatannya oleh kerana tiada kurangan langsung. Sebenarnya, perniagaannya baik dengan pendapat bersih RM3,000 sebulan. Ini menunjukkan walaupun kecederaannya, beliau masih dapat bekerja dan mendapatkan pendapatan yang lebih baik (lihat perenggan 9).

(3) Untuk tujuan menilai ganti rugi untuk 'kehilangan mata pencarian', s 28A Akta Undang-undang Sivil 1956 terpakai. Undang-undang adalah jelas bahawa pendapatan plaintif 'pada masa ia mengalami kecederaan' adalah amaun yang relevant yang sepatutnya diambil kira dalam pengiraan kehilangan mata pencarian. Peguambela perayu tidak habis-habis mengatakan berkenaan dengan pendapatan plaintif semasa bekerja dengan Denta Ocean Construction, tetapi keterangan di mahkamah menunjukkan bahawa pada masa yang material apabila plaintif mengalami kecederaan, beliau tidak bekerja dengan syarikat tersebut. Plaintif telah berhenti bekerja dengan Denta Ocean Construction sebulan sebelum tarikh kemalangan tersebut. Plaintif tidak menunjukkan bahawa keadaannya bertambah buruk selepas kemalangan tersebut dan menjejaskan kapasiti pendapatannya, akan tetapi, kapasiti pendapatannya bertambah baik selepas kemalangan tersebut (lihat perenggan 11–13).]

Notes

For a cases on loss of future earnings, see 6 *Mallal's Digest* (4th Ed, 2002 Reissue) para 507.

Cases referred to

Looi Gnan Peng v Bay Tong Hai [2005] 3 AMR 369

Legislation referred to

Civil Law Act 1956 s 28A

Harinder Singh (Mahindar & Co) for the appellant
Esther Jayaraja (Zaid Ibrahim & Co) for the respondent

Mohamed Apandi Ali J:

[1] This is an appeal by the plaintiff against my decision that was given on 14 June 2005 in respect of quantum only ie, 'the loss of future earnings and the award for pain and suffering'.

[2] This claim arises from an accident which occurred on 10 August 1997. The plaintiff/appellant was a passenger in an express bus. The bus that was driven by the second defendant had lost control of the said bus and overturned that caused plaintiff to suffer losses and injuries.

[3] The learned Sessions Court judge who heard the matter had refused to allow the plaintiffs claim for 'the loss of future earnings', and that the award for general

damages was said to be very low. The appeal on these issues has been dismissed. Hence this appeal.

LOSS OF FUTURE EARNINGS

[4] Plaintiff (PW5) was working with a company known as Denta Ocean Construction until June 1997. He then had to quit his job as his employer's contract had expired It is pertinent to note that he quit his job before the date of the accident.

[5] After quitting his job with Denta Ocean Construction, he then started working for his mother (PW4) at her coffee shop from 1 July 1997, which was also before the said accident. He was a cook and a waiter at the coffee shop for which he was paid RM50 per day (refer to pp 26–28 R/R).

[6] He met with an accident on 10 August 1997 and was unable to perform any work for six months after the accident. After that he went back to work with Denta Ocean Construction as a driver for a lesser pay compared to what he gets from his mother as a cook and waiter but the figure he received was not mentioned at all (refer to p 28 R/R).

[7] When he gave evidence in court on 10 March 2003, he has already started his own business, operating a coffee shop with his wife with a net income of RM3,000 per month '*Sekarang saya berniaga warung, berniaga dengan isteri. Pendapatan bersih kami RM3,000 sebulan*' (refer p 28 R/R).

[8] From the evidence, it is clear that the plaintiff did not suffer any loss but instead he was drawing a better income after the accident. As stated earlier he stopped working for Denta Ocean Construction not because of his inability to work but he had to, because his employer's contract job expired. There was no evidence indicating that the company refused to renew his contract because of his injuries. He chose to work for his mother who offered a 'better pay' as claimed.

[9] His evidence shows that he is not having any problem with his income as there was no reduction at all. In fact, his business is doing well with a net income of RM3,000 a month.

[10] This shows that despite his injuries he could still work and eke out a better living. His injuries had also improved as confirmed by PW2, an orthopedic from HTAA who said in his evidence during cross examination (p 23 R/R) that:

> Plaintif tidak datang follow up pada 21 Januari 1998. Rawatan terakhir pada 4 November 1997. Masa periksa plaintif, berdasarkan pada laporan, sakit plaintif sudah banyak berkurangan. Plaintif dalam proses pemulihan.

[11] For the purpose of assessing damages for 'loss of future earnings', s 28A of the Civil Law Act 1956 applies, and it reads as follows:

> Section 28A. Damages in respect of personal injury.
>
> (2) In assessing damages under this section —
>
> (a) no damages shall be recoverable in respect of any loss of expectation of life caused to the plaintiff by the injury;
>
> (b) if the plaintiffs expectation of life has been reduced by the injury, the court, in assessing damages in respect of pain and suffering caused by the injury, shall take into account any suffering caused or likely to be caused by awareness that his expectation of life has been so reduced;
>
> (c) in awarding damages for loss of future earnings the Court shall take into account —
>
> (i) that in the case of a plaintiff who has attained the age of fifty-five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured;
>
> (ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;
>
> (iii) any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured.

[12] The law is clear that the plaintiff's earnings 'at the time when he was injured' is the only relevant amount that shall be taken into account in computing any loss of future earnings. The appellant's counsel was harping on the plaintiff's earnings during his employment with Denta Ocean Construction, whereas evidence in court shows that at the material time when the plaintiff was injured, he was not working with the said company. The plaintiff had stopped working with Denta Ocean Construction one month before the date of accident.

[13] In the case of *Looi Gnan Peng v Bay Tong Hai* [2005] 3 AMR 369, the Court of Appeal states that:

> It is trite that a claim for special damages must be proved and in relations to a claim for loss of future earnings, s 28A of the Civil Law Act 1956 (the Act), provides that 'damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury' …

[14] In respect of the plaintiffs health, there was no evidence shown that the plaintiff was in good health but for the injury before the accident. Moreover, the plaintiff has not shown that his condition deteriorated after the accident and affected his earning capacity, but on the other hand, his earning capacity improved after the accident.

[15] An officer from the EPF (PW3) was also called to testify and said that based on the plaintiff's record (refer pp 69–80 R/R) for 1998, the contribution is higher compared to the previous years. Therefore it is clear that the plaintiff did not suffer any loss of earnings as regards to his income. With that finding of fact, the appeal by the plaintiff on this issue is dismissed with costs and the decision of the learned Sessions judge upheld.

GENERAL DAMAGES

[16] As regards to the general damages, the injuries suffered as per the medical reports of Hospital Tengku Ampuan Afzan and the Kuantan Medical Center (p 64 & 68 R/R) are:

(a) fracture of calcaneum; and

(b) laceration wound over right lateral malleous.

(a) Fracture of calcaneum

[17] For these injuries, PW1, an orthopedic from Kuantan Medical Center in his evidence (p 16 R/R) has stated that:

> Kepatahan telah bercantum tetapi tidak ditahap optimum.... Pesakit boleh berjalan seperti biasa. Boleh jalan tapi terencot-encot (limping). Tiada kependekan.

[18] PW2, an orthopedic from HTAA has also confirmed that plaintiff at the time he was assessed in November 1997, his condition has improved and he was in the process of full recovery. PW2 also in his evidence has not suggested any other treatment for this injury and there was no operation being performed on the plaintiff as the injury was not serious. He said:

> Saya tidak mengesyorkan rawatan lain untuk kecederaan ini.... Jika patahnya teruk saja pembedahan akan dilakukan. Untuk plaintif kami tidak buat pembedahan. Pembedahan tidak disyorkan, jadi kami tidak ada jumlah nilai rawatan.

[19] There is also no shortening of the limb and the medical report of Klinik Pakar Otopidik Nasiruddin also stated that 'There is no limb length discrepancy' (p 66 R/R). Therefore the award of RM20,000 is just and reasonable and is not inordinately low.

(b) Laceration wound over right lateral malleous

[20] The award of RM3,000 is reasonable as the cuts were located on the same fractured calcaneum. The plaintiff has submitted for RM4,000 as damages as there were scars but there was nowhere reported in the two medical reports about any appearing scars.

[21] Therefore the award given by the learned Sessions judge is reasonable and there is no reason to disturb the award, and therefore the appeal by the plaintiff on this ground is dismissed with costs.

Appeal dismissed with costs

Reported by Sally Kee